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## The Constitutionality of Current Crime Victimization Statutes: A Survey

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## The Constitutionality of Current Crime Victimization Statutes: A Survey

### Cover Page Footnote

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# The Constitutionality of Current Crime Victimization Statutes: A Survey

## INTRODUCTION

In 1977, the New York State legislature enacted the country's first crime victimization statute.<sup>1</sup> The statute was proposed in response to public outcry resulting from the offer of a book and movie deal to serial killer David Berkowitz, the self-dubbed "Son of Sam."<sup>2</sup> Since then, almost every state in the United States has enacted its own "Son of Sam" law.<sup>3</sup> Such statutes are designed for the dual purpose of compensating crime victims and preventing

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1. N.Y. EXEC. LAW § 632-a (McKinney 1982).

2. See Robert D. McFadden, *Suspect in "Son of Sam" Murders Arrested in Yonkers; Police Say .44 Caliber Weapon is Recovered*, N.Y. TIMES, Aug. 11, 1977, at A1.

3. See ALA. CODE §§ 41-9-80 to -84 (1991); ALASKA STAT. § 12.61.020 (1990); ARIZ. REV. STAT. ANN. § 13-4202 (1989); ARK. CODE ANN. § 16-90-308 (Michie 1987); CAL. CIV. CODE § 2225 (West Supp. 1994); COLO. REV. STAT. §§ 24-4.1-201 to -207 (1988); CONN. GEN. STAT. ANN. § 54-218 (West 1985); DEL. CODE ANN. tit. 11, §§ 9101-9106 (1987 & Supp. 1992); FLA. STAT. ANN. § 944.512 (West Supp. 1993); GA. CODE ANN. §§ 17-14-30 to -32 (Michie 1990); HAW. REV. STAT. §§ 351-81 to -88 (Supp. 1992); IDAHO CODE § 19-5301 (1987); ILL. ANN. STAT. ch. 725, para. 145 (Smith-Hurd 1992); IND. CODE ANN. §§ 12-18-7-1 to -6 (Burns 1992 & Supp. 1993); IOWA CODE ANN. § 910.15 (West 1994); KAN. STAT. ANN. §§ 74-7319 to -7321 (1992); KY. REV. STAT. ANN. § 346.165 (Michie/Bobbs-Merrill 1993); LA. REV. STAT. ANN. §§ 46:1831 to :1839 (West 1982 & Supp. 1993); MD. ANN. CODE art. 27, § 764 (Supp. 1993); MASS. ANN. LAWS ch. 258A, §§ 1-8 (Law. Co-op. 1992); MICH. COMP. LAWS ANN. § 780.768 (West Supp. 1993); MINN. STAT. ANN. § 611A.68 (West Supp. 1994); MISS. CODE ANN. §§ 99-38-1 to -11 (Supp. 1993); MO. ANN. STAT. § 595.045(14) (Vernon Supp. 1993); MONT. CODE ANN. §§ 53-9-103 to -104 (1993); NEB. REV. STAT. §§ 81-1835 to -1841 (1987 & Supp. 1992); NEV. REV. STAT. ANN. § 217.007 (Michie 1986 & Supp. 1993); N.J. STAT. ANN. §§ 52:4B-26 to -30 (West 1986); N.M. STAT. ANN. § 31-22-22 (Michie 1990); OHIO REV. CODE ANN. §§ 2969.01-.06 (Anderson 1993); OKLA. STAT. ANN. tit. 22, § 17 (West 1992); OR. REV. STAT. § 147.275 (Supp. 1992); PA. STAT. ANN. tit. 71, § 180-7.18 (1990); R.I. GEN. LAWS §§ 12-25.1-1 to -12 (Supp. 1993); S.C. CODE ANN. §§ 15-59-40 to -80 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. §§ 23A-28A-1 to -14 (1988); TENN. CODE ANN. §§ 29-13-201 to -208 (1980); TEX. REV. CIV. STAT. ANN. art. 8309, §§ 1-18 (West Supp. 1993); UTAH CODE ANN. § 78-11-12.5 (1992); VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993); WASH. REV. CODE ANN. §§ 7.68.200-.280 (West 1992); WIS. STAT. ANN. § 949.165 (West Supp. 1992); WYO. STAT. §§ 1-40-101 to -119 (1988). The following states have not enacted crime victimization statutes as of this writing: Maine, North Carolina, North Dakota, Vermont, and West Virginia.

criminals from profiting from their criminal actions by seizing any assets, profits or proceeds earned by a criminal defendant.<sup>4</sup>

New York's "Son of Sam" law created the Crime Victims Compensation Board of New York ("Crime Victims Board"), which was responsible for reviewing all contracts entered into by criminal defendants and for seizing all proceeds that were earned as a result of any reenactment of their criminal activities or of their "thoughts, feelings, opinions or emotions regarding such crime."<sup>5</sup> Such proceeds were maintained by the Crime Victims Board in an escrow account and distributed to crime victims when a monetary judgment was obtained against the criminal defendant.<sup>6</sup>

New York's statute has been applied in a number of cases since its enactment.<sup>7</sup> However, in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*,<sup>8</sup> the United States Supreme Court held that New York's statute violated the First Amendment to the U.S. Constitution.<sup>9</sup> The Court found that the statute was not narrowly tailored to the compelling state interests of compensating crime victims and preventing criminals from profiting from their crimes because of the statute's overbroad definition of a "person convicted of a crime" and because the statute placed a financial burden on criminal authors based on the content of their speech.<sup>10</sup>

The constitutionality of all crime victimization statutes has been

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4. See, e.g., 1977 N.Y. ST. LEGIS. ANN. 267 (memorandum of Sen. Samuel R. Gold); DEL. CODE ANN. tit. 11, § 9101 (1987); N.J. STAT. ANN. § 52:4B-26 (West 1986); see also *infra* notes 16-17 and accompanying text.

Crime victimization statutes use similar, but not identical, terms to describe the perpetrator of a crime. See, e.g., ALASKA STAT. § 12.61.020(e)(1) (1990) ("offender"); DEL. CODE ANN. tit. 11, § 9102(3) (Supp. 1992) ("person convicted of a crime"); R.I. GEN. LAWS § 12-25.1-2(d) (Supp. 1993) ("criminally responsible person"). This Note will use the term "criminal defendant" unless otherwise specified.

5. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

6. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

7. See *infra* note 27 and accompanying text.

8. 112 S. Ct. 501 (1991).

9. The First Amendment states in relevant part: "Congress shall make no law . . . abridging the freedom of speech or of the press . . ." U.S. CONST. amend. I.

10. 112 S. Ct. at 508-12; see *infra* notes 52-66 and accompanying text.

seriously jeopardized by the *Simon & Schuster* decision because most states had adopted statutes very similar to New York's legislation.<sup>11</sup> Several states, including New York, have amended their crime victimization statutes in an attempt to comply with the *Simon & Schuster* decision.<sup>12</sup> However, most states have allowed their current laws to stand.<sup>13</sup> The validity of the latter statutes is in doubt.<sup>14</sup>

Although the *Simon & Schuster* decision has generated a great deal of commentary,<sup>15</sup> no commentator has surveyed every crime

11. Compare N.Y. EXEC. LAW § 632-a (McKinney 1982) with statutes cited *supra* note 3.

12. See DEL. CODE ANN. tit. 11, §§ 9101-9106 (Supp. 1992); IOWA CODE ANN. § 910.15 (West 1994); MD. ANN. CODE art. 27, § 764 (Supp. 1993); NEV. REV. STAT. ANN. § 217.007 (Michie Supp. 1993); N.Y. EXEC. LAW § 632-a (McKinney Supp. 1994); VA. CODE ANN. § 19.2-368 (Michie Supp. 1993). But see IND. CODE ANN. § 12-18-7-1 to -6 (Burns Supp. 1993) (repealing IND. CODE ANN. § 12-18-7-1 to -6 (Burns 1992)).

13. See ALA. CODE §§ 41-9-80 to -84 (1991); ALASKA STAT. § 12.61.020 (1990); ARIZ. REV. STAT. ANN. § 13-4202 (1989); ARK. CODE ANN. § 16-90-308 (Michie 1987); CAL. CIV. CODE § 2225 (West Supp. 1994); COLO. REV. STAT. §§ 24-4.1-201 to -207 (1988); CONN. GEN. STAT. ANN. § 54-218 (West 1985); FLA. STAT. ANN. § 944.512 (West Supp. 1993); GA. CODE ANN. §§ 17-14-30 to -32 (Michie 1990); HAW. REV. STAT. §§ 351-81 to -88 (Supp. 1992); IDAHO CODE § 19-5301 (1987); ILL. ANN. STAT. ch. 725, para. 145 (Smith-Hurd 1992); KAN. STAT. ANN. §§ 74-7319 to -7321 (1992); KY. REV. STAT. ANN. § 346.165 (Michie/Bobbs-Merrill 1993); LA. REV. STAT. ANN. §§ 46:1831 to :1839 (West 1982 & Supp. 1993); MASS. ANN. LAWS ch. 258A, §§ 1-8 (Law. Co-op. 1992); MICH. COMP. LAWS ANN. § 780.768 (West Supp. 1993); MINN. STAT. ANN. § 611A.68 (West Supp. 1994); MISS. CODE ANN. §§ 99-38-1 to -11 (Supp. 1993); MO. ANN. STAT. § 595.045(14) (Vernon Supp. 1993); MONT. CODE ANN. §§ 53-9-103 to -104 (1993); NEB. REV. STAT. §§ 81-1835 to -1841 (1987 & Supp. 1992); N.J. STAT. ANN. §§ 52:4B-26 to -30 (West 1986); N.M. STAT. ANN. § 31-22-22 (Michie 1990); OHIO REV. CODE ANN. §§ 2969.01-.06 (Anderson 1993); OKLA. STAT. ANN. tit. 22, § 17 (West 1992); OR. REV. STAT. § 147.275 (Supp. 1992); PA. STAT. ANN. tit. 71, § 180-7.18 (1990); R.I. GEN. LAWS §§ 12-25.1-1 to -12 (Supp. 1993); S.C. CODE ANN. §§ 15-59-40 to -80 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. §§ 23A-28A-1 to -14 (1988); TENN. CODE ANN. §§ 29-13-201 to -208 (1980); TEX. REV. CIV. STAT. ANN. art. 8309, §§ 1-18 (West Supp. 1993); UTAH CODE ANN. § 78-11-12.5 (1992); WASH. REV. CODE ANN. §§ 7.68.200-.280 (West 1992); WIS. STAT. ANN. § 949.165 (West Supp. 1992); WYO. STAT. §§ 1-40-101 to -119 (1988).

14. See discussion *infra* parts III-IV.

15. For discussion of the Supreme Court decision in *Simon & Schuster*, see Mark A. Conrad, *New York's New "Son of Sam" Law—Does It Effectively Protect the Rights of Crime Victims to Seek Redress from Their Perpetrators?*, 3 FORDHAM ENT., MEDIA & INTELL. PROP. L.F. 27 (1992); Mark Conrad, *The Demise of New York's "Son of Sam" Law—The Supreme Court Upholds Convicts' Rights To Sell Their Stories*, N.Y. ST. B.J.,

victimization statute in the country. This Note will analyze every

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Mar.-Apr. 1992, at 28; Garrett Epps, *Wising Up: "Son of Sam" Laws and the Speech and the Press Clauses*, 70 N.C. L. REV. 493 (1992); Jacqui Gold Grunfeld, *Docudramas: The Legality of Producing Fact-Based Dramas—What Every Producer's Attorney Should Know*, 14 HASTINGS COMM. & ENT. L.J. 483 (1992); Elliot M. Minberg, *The Supreme Court and the First Amendment: The 1991-1992 Term*, 10 N.Y.L. SCH. J. HUM. RTS. 1 (1992); Benedict J. Caiola & Esther Oz, Note, *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board—"Crime Goes Hollywood"—The Striking Down of the "Son of Sam" Statute*, 14 WHITTIER L. REV. 859 (1993); Karen J. Folb, Comment, *Constitutional Law—First Amendment Challenge, to New York's "Son of Sam" Law—Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S. Ct. 501 (1991), 26 SUFFOLK U. L. REV. 697 (1992); Kelly Franks, Note, *"Son of Sam" Laws After Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board: Free Speech Versus Victims' Rights*, 14 HASTINGS COMM. & ENT. L.J. 595 (1992); Douglas J. Fryer, Note, *Bearing the Burden of Strict Scrutiny in the Wake of Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board: A Constitutional Analysis of Michigan's "Son of Sam" Law*, 70 U. DET. MERCY L. REV. 191 (1992); Ralph W. Johnson, III, Comment, *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board: The Demise of New York's Son of Sam Law and the Decision That Could Have Been*, 2 FORDHAM ENT., MEDIA & INTELL. PROP. L.F. 193 (1992); Connie Koshiol, Comment, *Strict Scrutiny Sounds the Death Knell for New York's Son of Sam Law*, 17 S. ILL. U. L.J. 599 (1993); Andrew Michael Lauri & Patricia M. Schaubeck, Note, *Like Father Like Son? The Constitutionality of New York's Son of Sam Law*, 8 ST. JOHN'S J. LEGAL COMMENT. 279 (1992); William E. Lawrence, Note, *Constitutional Law—Freedom of Speech—Crime May Pay: New York's Son of Sam Law Found Unconstitutional*, 14 U. ARK. LITTLE ROCK L.J. 673 (1992); Michele C. Meske, Note, *Between the Devil and the Deep Blue Sea: Crime Victims' Dilemma After Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 67 WASH. L. REV. 1001 (1992); Lisa Ann Morelli, Note, *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board: How Characterization of a Speech Regulation Can Effectively Destroy a Legitimate Law*, 42 CATH. U. L. REV. 651 (1993); Jon Allyn Soderberg, Note, *Son of Sam Laws: A Victim of the First Amendment?*, 49 WASH. & LEE L. REV. 629 (1992); Adam Robert Tschorn, *Beyond Son of Sam: Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, and a Constitutionally Valid Alternative to New York Executive Law Section 632-a*, 17 VT. L. REV. 321 (1992); Lori K. Zavack, Note, *Can States Enact Constitutional "Son of Sam" Laws After Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 37 ST. LOUIS U. L.J. 701 (1993); Elizabeth Buroker Coffin, Case Note, *Constitutional Law: Content-Based Regulations on Speech: A Comparison of the Categorization and Balancing Approaches to Judicial Scrutiny—Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 18 U. DAYTON L. REV. 593 (1993); Melissa M. Erlmeier, Case Note, *The First Amendment Prevails Over Crime Victim Compensation: Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 26 CREIGHTON L. REV. 1301 (1993); Carol M. Grebb, Recent Decisions, 31 DUQ. L. REV. 401 (1993); Tanya Herrera, Recent Development, 28 HARV. C.R.-C.L. L. REV. 567 (1993); Kevin S. Reed, Recent Developments, 15 HARV. J.L. & PUB. POL'Y 1060 (1992).

state crime victimization statute and determine which comply with the *Simon & Schuster* decision. Part I will review the legislative history of New York's original crime victimization statute, the Supreme Court's decision in *Simon & Schuster*, and New York's amended statute. Part II will discuss generally the provisions that are common to the majority of the nation's crime victimization statutes. Part III will address the crime victimization statutes that contain unconstitutionally overbroad definitions of a criminal defendant and the statutes which have amended this definition to comply with *Simon & Schuster*. Part IV will examine those statutes which unconstitutionally single out the speech of criminal authors and place a financial burden on that speech. This Note will conclude that forty-one out of the forty-five current state crime victimization statutes in the country are unconstitutional under *Simon & Schuster* because such statutes are not narrowly tailored to serve the compelling state interests in compensating crime victims and preventing criminals from profiting from their crimes.

## I. *SIMON & SCHUSTER* AND NEW YORK'S "SON OF SAM" LAW

### A. *Overview of New York's Original "Son of Sam" Law*

In August 1977, the New York City Police Department arrested David Berkowitz, the self-identified "Son of Sam" killer.<sup>16</sup> The realization that Berkowitz would profit from his crimes by contributing to a book or movie was appalling to many.<sup>17</sup> As a result, New York State Senator Samuel R. Gold proposed legislation that would prevent criminals, such as Berkowitz, from profiting from their crimes.<sup>18</sup> Gold stated:

It is abhorrent to one's sense of justice and decency that an

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16. See McFadden, *supra* note 2.

17. See Sam Roberts, *Criminals, Authors, and Criminal Authors*, N.Y. TIMES, Mar. 22, 1987, § 7, at 1. No one believed that Berkowitz's random slayings were motivated by a book or movie deal. "But the possibility of his reaping profits from the murders seemed appalling, and the general stampede by authors, publishers and producers to record and buy the recollections and memoirs of murderers and other criminals had become unseemly at best." *Id.*

18. 1977 N.Y. ST. LEGIS. ANN. 267 (memorandum of Sen. Samuel R. Gold).

individual, such as the forty-four caliber killer [Berkowitz], can expect to receive large sums of money for his story once he is captured while five [sic] people are dead, other people were injured as a result of his conduct. This bill would make it clear that in all criminal situations, the victim must be more important than the criminal.<sup>19</sup>

As a result, the New York State legislature enacted section 632-a of the Executive Law in 1977.<sup>20</sup> The statute required that any contract which was entered into with a person accused or convicted of a crime and which related to the reenactment of such crime must be submitted to the Crime Victims Board.<sup>21</sup> A "person convicted

19. 1977 N.Y. ST. LEGIS. ANN. 267 (memorandum of Sen. Samuel R. Gold). Berkowitz murdered six people and wounded seven others. Brian Katz, *Inmate 78A-1976 Berkowitz*, N.Y. DAILY NEWS, Nov. 7, 1993, at 6. Furthermore, the Declaration of policy and legislative intent of New York Executive Law states:

The legislature recognizes that many innocent persons suffer personal physical injury or death as a result of criminal acts. Such persons or their dependents may thereby suffer disability, incur financial hardships, or become dependent upon public assistance. The legislature finds and determines that there is a need for government financial assistance for such victims of crime. Accordingly, it is the legislature's intent that aid, care and support be provided by the state, as a matter of grace, for such victims of crime.

N.Y. EXEC. LAW § 620 (McKinney 1982).

20. N.Y. EXEC. LAW § 632-a (McKinney 1982). Ironically, the law did not apply to David Berkowitz because he had been declared mentally incompetent to stand trial. Roberts, *supra* note 17, at 1. Section 632-a(6) of the Executive Law required that in a situation where an individual "who is unfit to proceed as a result of mental disease or defect because such person lacks capacity to understand the proceedings against him or to assist in his own defense," the Crime Victims Board shall bring an action of interpleader to determine the disposition of the escrow account. N.Y. EXEC. LAW § 632-a(6) (McKinney 1982); *see* N.Y. CIV. PRAC. L. & R. 1006 (McKinney 1963) (setting forth procedure for bringing an action of interpleader).

21. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982). Section 632(a)(1) of the statute provided in pertinent part:

Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the [B]oard and pay over the [B]oard any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or



of a crime" was defined as any individual convicted of a crime at trial or by the entry of a plea of guilty as well as "any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted."<sup>22</sup>

Section 632-a further required that any proceeds owed to the accused or convicted individual for reenactments of their crime be turned over to the Crime Victims Board.<sup>23</sup> The Board would then deposit this money in escrow accounts for the benefit of crime victims if the crime were committed by a convicted individual or an accused person who is eventually convicted.<sup>24</sup> Crime victims had five years to bring a civil action to recover a money judgment against criminal defendants or their representatives.<sup>25</sup> If a money judgment was obtained, the crime victim would be compensated from the funds in an escrow account maintained by the Board.<sup>26</sup>

#### B. Simon & Schuster

Section 632-a has only been applied to a few, but infamous,

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his representatives.

N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

22. N.Y. EXEC. LAW § 632-a(10)(b) (McKinney 1982). Under section 632-a, a person found not guilty as a result of a defense of a mental disease or defect was deemed to be convicted. N.Y. EXEC. LAW § 632-a(5) (McKinney 1982).

23. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

24. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

25. N.Y. EXEC. LAW § 632-a(2) (McKinney 1982). The Board was required to publish a legal notice, in a newspaper of general circulation in the county where the crime was committed, every six months for five years from the date the escrowed funds were received to inform all victims that such funds were available. N.Y. EXEC. LAW § 632-a(2) (McKinney 1982).

26. N.Y. EXEC. LAW § 632-a(2) (McKinney 1982). The statute prioritized the granting of claims for money contained in the escrow account as follows: first, claims for legal representation; second, subrogation claims of the state; third, civil judgments for the victims of the crime; fourth, judgments for others with lawful claims including state or local tax authorities; and last, any remaining money for the person accused or convicted of the crime. N.Y. EXEC. LAW § 632-a(11) (McKinney 1982). Furthermore, if five years had elapsed from the establishment of the escrow account and no claims had been filed against the convicted person, the money was to be returned to such individual or to his or her legal representative. N.Y. EXEC. LAW § 632-a(4) (McKinney 1982). This subsection contradicted with the definition of a person convicted of a crime. *See supra* note 22 and accompanying text.

cases since its enactment.<sup>27</sup> However, the constitutionality of section 632-a was not challenged successfully until publishing house Simon & Schuster, Inc. ("Simon & Schuster") prevailed in its action before the United States Supreme Court.<sup>28</sup> In 1981, Simon & Schuster bought the rights to *Wiseguy: Life in a Mafia Family* ("Wiseguy"), a book based on the life of former organized crime associate, Henry Hill.<sup>29</sup> Published in 1986, the book described a number of crimes committed by Hill, most of which did not result in convictions.<sup>30</sup> Pursuant to section 632-a, the Crime Victims Board ordered Simon & Schuster to turn over copies of all contracts entered into with Hill to determine if the contracts were the type covered by the crime victimization statute.<sup>31</sup> The Board further ordered Simon & Schuster to suspend all remaining payments to Hill.<sup>32</sup>

After reviewing the book and the payment contracts between Hill and Simon & Schuster, the Crime Victims Board determined that the proceeds from *Wiseguy* resulted from the commission of crimes and that Simon & Schuster had violated section 632-a by failing to turn over all contracts to the Board.<sup>33</sup> The Board ordered Simon & Schuster to turn over payments owed to Hill so that this money could be held in escrow for the benefit of crime victims.<sup>34</sup> The Board also ordered Hill to turn over the money he had already

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27. See Roberts, *supra* note 17, at 1. Some notable cases include: John Wojtowicz, whose bank robbery was depicted in the film *Dog Day Afternoon*; Salvador Agron, the "Capeman Killer," who killed two Manhattan teenagers; Jack Henry Abbott, who was convicted of killing an aspiring actor; and Jean Harris, who was convicted of killing Dr. Herman Tarnower. *Id.*

28. See *infra* part I.B.2.

29. 'Son of Sam' Laws Rightly Reversed, N.Y. TIMES, Dec. 12, 1991, at A30. The book *Wiseguy* later formed the basis for the motion picture *Goodfellas*. *Id.*

30. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501, 506 (1991).

31. *Id.* at 507.

32. *Id.*

33. *Id.* Although Simon & Schuster turned over the contracts to the Crime Victims Board pursuant to a request, their initial failure to voluntarily do so placed them in violation of section 632-a.

34. *Id.*

received.<sup>35</sup>

### 1. The Lower Court Decisions

In 1987, Simon & Schuster brought an action against the Crime Victims Board in the District Court for the Southern District of New York, alleging that section 632-a violated the First and Fourteenth Amendments to the U.S. Constitution.<sup>36</sup> The district court rejected the constitutional challenge and upheld the law.<sup>37</sup> The court reasoned that although section 632-a made it more difficult for publishers to publish books with the assistance of criminal sources, it did not prohibit speech.<sup>38</sup> The statute merely prevented the convicted criminal from receiving any proceeds until the victims were provided with the opportunity for compensation.<sup>39</sup> The court found that the interest of compensating victims for their suffering was unrelated to the suppression of free expression, and any "burden on free expression [was] merely incidental."<sup>40</sup>

The court examined the statute under the intermediate scrutiny standard of review set forth by the United States Supreme Court in *United States v. O'Brien*.<sup>41</sup> The district court stated that under *O'Brien*, a "sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First

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35. *Id.*

36. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 724 F. Supp. 170 (S.D.N.Y. 1989), *aff'd sub nom. Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777 (2d Cir. 1990), *rev'd sub nom. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S. Ct. 501 (1991).

37. 724 F. Supp. 170.

38. *Id.* at 176. In rejecting the Fourteenth Amendment challenge the court stated, "[t]he statute provides fair notice to those to whom it applies, it provides guidelines for compliance, and . . . the statute does not inhibit the exercise of basic constitutional freedoms." *Id.* at 180.

39. *Id.* at 179.

40. *Id.* at 177.

41. *Id.* (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). The intermediate standard set forth in *O'Brien* requires that the following criteria be met for a statute to be deemed constitutional under the First Amendment: (1) it must be enacted within the constitutional power of the government; (2) it must further an important or substantial governmental interest; (3) the interest must be unrelated to speech; and (4) the restriction does no more than is necessary to serve the governmental interest. 391 U.S. at 376.

Amendment freedoms.”<sup>42</sup> The court found that section 632-a did not prohibit expressive activity; rather, it was limited to the non-expressive element of recollecting the crime, namely, receiving a profit.<sup>43</sup> Therefore, the court held that the statute was constitutional because the restriction did no more than was necessary to serve the state’s interest in compensating crime victims.<sup>44</sup>

In 1990, the United States Court of Appeals for the Second Circuit affirmed the decision of the district court,<sup>45</sup> but disagreed with the lower court’s utilization of the *O’Brien* test.<sup>46</sup> The court of appeals concluded that since the New York statute directly burdened the speech of those who wanted to sell stories based on the crimes they committed, the application of a strict scrutiny standard of review was required.<sup>47</sup> The statute was content-based, and “for the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”<sup>48</sup>

Despite finding that the statute restricted speech, the court held that section 632-a was constitutional under the strict scrutiny standard.<sup>49</sup> The court found that the state had a compelling interest in ensuring that criminals did not profit from their crimes at the expense of victims who deserved compensation.<sup>50</sup> The court also found that the statute was narrowly tailored to the state’s interest in delaying the criminals’ receipt of the proceeds from their stories until victims were fully compensated.<sup>51</sup> The court, therefore, held

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42. 724 F. Supp. at 178 (citing *O’Brien*, 391 U.S. at 376).

43. *Id.* at 178-79.

44. *Id.* at 179.

45. *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777 (2d Cir. 1990).

46. *Id.* at 781.

47. *Id.* at 781-82.

48. *Id.* at 782 (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

49. *Id.* at 783. However, in his dissenting opinion, Judge Jon O. Newman found that the statute did not survive strict scrutiny because it was both underinclusive and overinclusive. *Id.* at 786-87 (Newman, J. dissenting).

50. *Id.* at 783.

51. *Id.* at 782-83. “The First Amendment right to speak is restricted only as a consequence of [a criminal author’s] inability to profit until the victim is compensated.” *Id.* at 783.

that section 632-a was constitutional.

## 2. The Decision of the United States Supreme Court

In an unanimous decision, the United States Supreme Court reversed the decision of the court of appeals.<sup>52</sup> Although the Court applied the same standard of strict scrutiny as had the court of appeals,<sup>53</sup> it held that the statute failed to meet that standard. Justice Sandra Day O'Connor, writing for the Court, stated that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."<sup>54</sup> The Court found section 632-a to be content-based legislation because it singled out the income received as a result of the expressive activity of a wrongdoer, without placing any such burden on any other income.<sup>55</sup>

In order to justify the differential treatment of non-criminal and criminal authors imposed by section 632-a, the Court determined that the state must show that such content-based legislation serves a compelling state interest and that it is narrowly drawn to achieve that end.<sup>56</sup> The Court recognized that New York had a compelling state interest in compensating crime victims as well as ensuring that criminals do not profit from their crimes.<sup>57</sup> The Court stated, however, that the Crime Victims Board "cannot explain why the State should have any greater interest in compensating victims from the proceeds of such 'storytelling' than from any of the criminal's

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For a more detailed discussion of the lower courts' decisions, see Jeanne E. Dugan, Comment, *Crime Doesn't Pay—Or Does It?: Simon and Schuster, Inc. v. Fischetti*, 65 ST. JOHN'S L. REV. 981 (1991); Karen M. Ecker & Margot J. O'Brien, Note, *Simon and Schuster, Inc. v. Fischetti: Can New York's Son of Sam Law Survive First Amendment Challenge?*, 66 NOTRE DAME L. REV. 1075 (1991).

52. 112 S. Ct. 501 (1991) (Justice Thomas had not yet been appointed to the Court during oral arguments and therefore took no part in the decision).

53. See *supra* notes 47-51 and accompanying text.

54. *Simon & Schuster*, 112 S. Ct. at 508 (citing *Leathers v. Medlock*, 111 S. Ct. 1438, 1443-1444 (1991)).

55. *Id.* at 508.

56. *Id.* at 509 (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987)).

57. *Id.* at 509-10.

other assets.”<sup>58</sup> The Court held that the statute unconstitutionally singled out particular speech and placed a financial burden on it.<sup>59</sup>

The Court further determined that section 632-a was “significantly overinclusive” and therefore was not narrowly tailored to the state’s objective of compensating victims.<sup>60</sup> The statute’s broad definition of a “person convicted of a crime”<sup>61</sup> enabled the state to seize the proceeds of authors who had been convicted of crimes as well as those authors who had never been convicted but had merely admitted to having committed crimes.<sup>62</sup> The Court noted that this broad definition would have attached the proceeds of such authors as Henry Thoreau and Martin Luther King, Jr., both of whom admitted to committing crimes for which they were never convicted.<sup>63</sup> Therefore, section 632-a was not narrowly tailored to the objective of compensating crime victims, and the statute was declared unconstitutional.<sup>64</sup>

Because the Supreme Court was limited to the facts before it in *Simon & Schuster*, it did not address the constitutionality of provisions found in many other states’ crime victimization statutes.<sup>65</sup> Despite the Supreme Court’s decision, a number of states continue to have laws that are virtually identical to New York’s “Son of Sam” statute.<sup>66</sup> Other states, however, have amended their laws in an attempt to comply with the Court’s decision in *Simon & Schuster*.<sup>67</sup>

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58. *Id.* at 510.

59. *Id.* at 508.

60. *Id.* at 511.

61. See *supra* note 22 and accompanying text.

62. 112 S. Ct. at 511.

63. The Court also cited the works of such authors as Malcolm X, Emma Goldman, Sir Walter Raleigh, Jesse Jackson, and Bertrand Russell. *Id.*

64. *Id.* at 512. The Court did not explicitly object to the provision deeming a person found not guilty as a result of a mental disease or defect as a convicted person. See *supra* note 22.

65. *Id.* “The Federal Government and many of the States have enacted statutes designed to serve purposes similar to that served by the Son of Sam law. Some of these statutes may be quite different from New York’s and we have no occasion to determine the constitutionality of these other laws.” *Id.*

66. See statutes cited *supra* note 13.

67. See statutes cited *supra* note 12.

### C. *The Amended New York Crime Victimization Statute*

After the ruling of *Simon & Schuster*, the New York legislature significantly revised and amended the state's crime victimization statute.<sup>68</sup> Designed to "recapture for crime victims much of what was intended for them" under the original "Son of Sam" statute, the amended statute focuses on the profits of crime rather than the speech of criminals.<sup>69</sup> In describing the new law, a co-sponsor of the legislation, former Assemblyman Alan G. Hevesi, stated that speech was protected in the amended statute, but profiting from the crime was not.<sup>70</sup>

Under section 632-a of the amended statute, any entity which "contracts for, pays, or agrees to pay, any profit from a crime . . . to a person charged with or convicted of that crime" shall give notice to the Crime Victims Board of the payment or the obligation to pay as soon as it becomes aware that the payment is intended as a profit from committing a crime.<sup>71</sup> Thus, unlike the original statute which limited the forfeiture of the proceeds to any money earned as a result of First Amendment activity, the amended statute removes all specific references to First Amendment activities.<sup>72</sup>

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68. Compare N.Y. EXEC. LAW § 632-a (McKinney Supp. 1994) with N.Y. EXEC. LAW § 632-a (McKinney 1982).

69. 1992 N.Y. LEGIS. ANN. 382 (memorandum of Assemblyman Alan G. Hevesi). Immediately after its enactment, the statute was criticized by the New York Civil Liberties Union ("NYCLU"). Gary Spencer, *Revised 'Son-of-Sam' Law Signed by Governor Cuomo*, N.Y.L.J., Aug. 14, 1992, at 1; see Conrad, *supra* note 15, at 45-47. The NYCLU claimed that the new bill's focus on the profits of a crime "produces the same constitutional infirmity as in the original." Spencer, *supra*, at 1. However, Senator Gold, who also sponsored the new law, defended the amended statute when he stated, "[t]his law is for the common criminals. If they win a lottery or receive money from a relative, the court can step in and protect the victim. Reparations and restitution will help restore the balance of justice." Stacy Shelton, *New Law Curbs Inmates' Book, Movie Profits*, NEWSDAY, Aug. 14, 1992, at 18.

70. 1992 N.Y. LEGIS. ANN. 382 (memorandum of Assemblyman Alan G. Hevesi); Sam Howe Verhovek, *Pact in Albany Limits Profits of Criminals*, N.Y. TIMES, July 3, 1992, at B1. Upon signing the bill into law on July 24, 1992, Governor Cuomo commented that it "implements broadly, wisely and fairly a vision of essential justice between those who have been hurt, and those who have hurt them." *New York Enacts Amended "Son of Sam" Law*, 14 ENT. L. REP. 11 (Apr. 1993).

71. N.Y. EXEC. LAW § 632-a(2)(a) (McKinney Supp. 1994).

72. Compare N.Y. EXEC. LAW § 632-a (McKinney Supp. 1994) with N.Y. EXEC.

Furthermore, "profits from the crime" is now defined as: (1) any property obtained through income generated from the commission of the crime; (2) any property obtained or income generated from the sale or conversion or exchange of proceeds of the crime; and (3) any property or income generated as a result of having committed the crime.<sup>73</sup> Therefore, the statute reaches the proceeds of a crime generated from any source.

Moreover, the revised statute deleted the definition in the original statute of "person convicted of a crime," which the Supreme Court had declared unconstitutional.<sup>74</sup> The Court had held the definition to be overinclusive because it enabled the state to reach the proceeds earned by an individual never convicted of a crime and therefore was not narrowly tailored to the state's objectives.<sup>75</sup> Currently, a "person convicted of a crime" is undefined.<sup>76</sup>

Finally, although *Simon & Schuster* did not specifically require that the Crime Victims Board refrain from escrowing crime proceeds, the Board no longer maintains escrow accounts.<sup>77</sup> The Board is responsible for notifying all known victims of the existence of such profits earned by the criminal defendant.<sup>78</sup> Crime victims, under the amended statute, continue to have the right to bring a civil cause of action to recover money damages from a person convicted of a crime.<sup>79</sup> The amended New York statute is

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LAW § 632-a(1) (McKinney 1982).

73. N.Y. EXEC. LAW § 632-a(1)(b) (McKinney Supp. 1994).

74. Compare N.Y. EXEC. LAW § 632-a (McKinney Supp. 1994) with N.Y. EXEC. LAW § 632-a(10) (McKinney 1982).

75. See *supra* notes 60-63 and accompanying text.

76. See N.Y. EXEC. LAW § 632-a (McKinney Supp. 1994).

77. Compare N.Y. EXEC. LAW § 632-a(1) (McKinney Supp. 1994) with N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

78. N.Y. EXEC. LAW § 632-a(2)(a) (McKinney Supp. 1994). The Crime Victims Board shall continue to publish a legal notice in a newspaper of general circulation, once every six months, for three years, in an attempt to notify all unknown victims. Compare N.Y. EXEC. LAW § 632-a(5)(b) (McKinney Supp. 1994) with N.Y. EXEC. LAW § 632-a(2) (McKinney 1982) (publish a notice once every six months for five years).

79. Compare N.Y. EXEC. LAW § 632-a(3) (McKinney Supp. 1994) with N.Y. EXEC. LAW § 632-a(1) (McKinney 1982). Crime victims now have seven years instead of five to bring a civil action to recover money damages against a person convicted of the crime. Compare N.Y. CIV. PRAC. L. & R. § 213-b (McKinney Supp. 1994) with N.Y. EXEC.



constitutional under the *Simon & Schuster* decision because the statute no longer singles out speech and places a financial burden on it.<sup>80</sup>

## II. PROVISIONS COMMON TO CRIME VICTIMIZATION STATUTES

The majority of crime victimization statutes currently in effect contain similar procedural provisions, none of which were contested in *Simon & Schuster*. Almost all crime victimization statutes specifically require that the crime victim make a civil claim to recover any money judgment against the convicted individual.<sup>81</sup> In

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LAW § 632-a(2) (McKinney 1982). The new law provides an additional three-year statute of limitations for those individuals who do not discover the profits generated by the crime until after the original seven-year statute of limitations has lapsed. N.Y. EXEC. LAW § 632-a(3) (McKinney Supp. 1994). Victims now may recover during a criminal proceeding without having to file a civil action. N.Y. PENAL LAW § 60.27 (McKinney 1982 & Supp. 1994). Further, judges have the authority to order restitution and reparation. N.Y. PENAL LAW § 60.27 (McKinney 1982 & Supp. 1994).

80. See *supra* notes 52-66 and accompanying text.

Former New York Attorney General Robert Abrams recently filed a lawsuit under the revised statute to set aside the profits from a movie deal based on the crimes of Thomas Grasso who was convicted in New York for killing an eighty-two year old woman and sentenced to death in Oklahoma for the murder of his eighty-seven year old neighbor. Nicholas Goldberg, *Slay Profit Deplored*, NEWSDAY, Oct. 15, 1993, at 22. This could be the first application of the amended statute.

Grasso and his attorney, Johnie O'Neal, sold their movie rights for one dollar each to an agent, Tim Oliver. *Id.* Abrams alleged that Grasso violated New York State's "Son of Sam" law by selling his rights for less than fair value so he could prevent the victim's families from claiming any of the proceeds. Jerry Gray, *Political Notes*, N.Y. TIMES, Nov. 28, 1993, § 1, at 50. Oliver had indicated that he planned to make millions of dollars from the stories pertaining to Grasso's crimes. Goldberg, *supra*, at 22. O'Neal indicated that he should be reimbursed for his "expenses" from any money that is earned as a result of the "Grasso" story. Tom Murnane, *Grasso Attorney Inches Off Promise Made on ABC's "Day 1"*, UPI, Oct. 27, 1993, available in LEXIS, NEWS Library, UPI file. O'Neal argues that the New York lawsuit should not apply to him because he is acting under Oklahoma law and, regardless of which state's law he acts under, the "Son of Sam" law only applies to criminals and not their attorneys. *Id.* Abrams, who has since resigned from the Attorney General's Office, had been investigating to determine whether the law also applies to those who profit from their association with criminals. See *id.*

81. See ALA. CODE § 41-9-80 (1991); ALASKA STAT. § 12.61.020(c) (1990); ARIZ. REV. STAT. ANN. § 13-4202(B)(2) (1989); ARK. CODE ANN. § 16-90-308(c)(1) (Michie 1987); CAL. CIV. CODE § 2225(9)(c) (West Supp. 1994); COLO. REV. STAT. § 24-4.1-

addition, most states require that criminal defendants remit the proceeds earned as a result of their criminal activities to the state so that it can hold the money in an escrow account for the benefit of crime victims.<sup>82</sup>

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201(1) (1988); CONN. GEN. STAT. ANN. § 54-218(a) (West 1985); DEL. CODE ANN. tit. 11, § 9103(a) (Supp. 1992); FLA. STAT. ANN. § 944.512(2)(b) (West Supp. 1993); GA. CODE ANN. § 17-14-31(3) (Michie 1990); HAW. REV. STAT. § 351-84 (Supp. 1992); IDAHO CODE § 19-5301(1) (1987); ILL. ANN. STAT. ch. 725, para. 145/3 (Smith-Hurd 1992); IOWA CODE ANN. § 910.15(5) (West 1994); KAN. STAT. ANN. § 74-7319(b) (1992); KY. REV. STAT. ANN. § 346.165(2) (Michie/Bobbs-Merrill 1993); LA. REV. STAT. ANN. § 46:1832(B) (West 1982); MD. ANN. CODE art. 27, § 764(e)(2) (Supp. 1993); MASS. ANN. LAWS ch. 258A, § 8 (Law. Co-op. 1992); MICH. COMP. LAWS ANN. § 780.768(18)(3)(b) (West Supp. 1993); MINN. STAT. ANN. § 611A.68(4b) (West Supp. 1994); MISS. CODE ANN. § 99-38-7(2) (Supp. 1993); MO. ANN. STAT. § 595.045(14)(2) (Vernon Supp. 1993); MONT. CODE ANN. § 53-9-104(1)(d) (1993); NEV. REV. STAT. ANN. § 217.007(1) (Michie Supp. 1993); N.J. STAT. ANN. § 52:4B-28 (West 1986); N.M. STAT. ANN. § 31-22-22(B) (Michie 1990); N.Y. EXEC. LAW § 632-a(3) (McKinney Supp. 1994); OHIO REV. CODE ANN. § 2969.04(c) (Anderson 1993); OKLA. STAT. ANN. tit. 22, § 17(c) (West 1992); OR. REV. STAT. § 147.275(3)(b) (Supp. 1992); PA. STAT. ANN. tit. 71, § 180-7.18(a) (1990); R.I. GEN. LAWS § 12-25.1-3(c) (Supp. 1993); S.C. CODE ANN. § 15-59-40 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 23A-28A-3 (1988); TENN. CODE ANN. § 29-13-202(b) (1980); TEX. REV. CIV. STAT. ANN. art. 8309, § 17 (West Supp. 1993); UTAH CODE ANN. § 78-11-12.5(1)(b) (1992); VA. CODE ANN. § 19.2-368.21(4)(1) (Michie Supp. 1993); WASH. REV. CODE ANN. § 7.68.200 (West 1992); WIS. STAT. ANN. § 949.165(2) (West Supp. 1992); WYO. STAT. § 1-40-112(f) (1988). *But see* NEB. REV. STAT. §§ 81-1836 to -1841 (1987 & Supp. 1992) (no specific provision).

82. *See* ALA. CODE § 41-9-80 (1991); ALASKA STAT. § 12.61.020(a) (1990); ARIZ. REV. STAT. ANN. § 13-4202(B) (1989); ARK. CODE ANN. § 16-90-308(2) (Michie 1987); CAL. CIV. CODE § 2225(9)(b) (West Supp. 1994); COLO. REV. STAT. § 24-4.1-201(1) (1988); CONN. GEN. STAT. ANN. § 54-218(a) (West 1985); DEL. CODE ANN. tit. 11, § 9103(a) (Supp. 1992); GA. CODE ANN. § 17-14-31(2) (Michie 1990); HAW. REV. STAT. § 351-82 (Supp. 1992); IDAHO CODE § 19-5301(1) (1987); ILL. ANN. STAT. ch. 725, para. 145/3 (Smith-Hurd 1992); IOWA CODE ANN. § 910.15(2) (West 1994); KAN. STAT. ANN. § 74-7319(a) (1992); KY. REV. STAT. ANN. § 346.165(2) (Michie/Bobbs-Merrill 1993); LA. REV. STAT. ANN. § 46:1832(B) (West 1982); MD. ANN. CODE art. 27, § 764(c)(7) (Supp. 1993); MASS. ANN. LAWS ch. 258A, § 8 (Law. Co-op. 1992); MICH. COMP. LAWS ANN. § 780.768(18)(2) (West Supp. 1993); MINN. STAT. ANN. § 611A.68(2a) (West Supp. 1994); MISS. CODE ANN. § 99-38-7 (Supp. 1993); MO. ANN. STAT. § 595.045(14)(1) (Vernon Supp. 1993); MONT. CODE ANN. § 53-9-104 (1993); NEB. REV. STAT. § 81-1836 (1987); N.J. STAT. ANN. § 52:4B-28 (West 1986); N.M. STAT. ANN. § 31-22-22(A) (Michie 1990); OHIO REV. CODE ANN. § 2969.02(A) (Anderson 1993); OKLA. STAT. ANN. tit. 22, § 17(A) (West 1992); OR. REV. STAT. § 147.275(2) (Supp. 1992); PA. STAT. ANN. tit. 71, § 180-7.18(a) (1990); R.I. GEN. LAWS § 12-25.1-3(A) (Supp. 1993); S.C. CODE ANN. § 15-59-40 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 23A-28A-1 (1988); TENN. CODE ANN. § 29-13-202(b) (1980); TEX. REV. CIV. STAT. ANN. art.

A majority of crime victimization statutes also have a provision requiring the appropriate state agency to notify crime victims as to the existence of the escrowed funds.<sup>83</sup> Some states require that the appropriate state agency publish a legal notice in a newspaper of general circulation once every six months for five years.<sup>84</sup> Other states, however, require a notice to be published for a shorter period of time<sup>85</sup> or have no notice provision.<sup>86</sup> Some states also require

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8309, § 16 (West Supp. 1993); UTAH CODE ANN. § 78-11-12.5(1) (1992); WASH. REV. CODE ANN. § 7.68.200 (West 1992); WIS. STAT. ANN. § 949.165(2) (West Supp. 1992); WYO. STAT. § 1-40-112 (1988). *But see* FLA. STAT. ANN. § 944.512 (West Supp. 1993) (lien attaches in favor of the state); HAW. REV. STAT. § 351-82 (Supp. 1992) (50 percent of the proceeds go to the legal representation of the criminal defendant and fifty percent go to the crime victims fund); LA. REV. STAT. ANN. § 46:1832(B) (West 1982) (75 percent of the proceeds go to the benefit of crime victims and 25 percent go to the state victims treasury); NEV. REV. STAT. ANN. § 217.265 (Michie 1986 & Supp. 1993) (the legislature repealed the section requiring that any proceeds received by the defendant be placed into a state fund); VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993) (money is subject to forfeiture).

83. *See infra* notes 84-87 and accompanying text.

84. *See* DEL. CODE ANN. tit. 11, § 9103(b) (Supp. 1992); GA. CODE ANN. § 17-14-31(f) (Michie 1990); IDAHO CODE § 19-5301(2) (1987); MD. ANN. CODE art. 27, §§ 764(a)-(c) (Supp. 1993); MO. ANN. STAT. § 595.045(14)(3) (Vernon Supp. 1993); N.J. STAT. ANN. § 52:4B-28 (West 1986) (identify all known and publish a notice every six months for five years); OKLA. STAT. ANN. tit. 22, § 17(D) (West 1992); PA. STAT. ANN. tit. 71, § 180-7.18(c) (1990); S.C. CODE ANN. § 15-59-50 (Law. Co-op. Supp. 1992); WASH. REV. CODE ANN. § 7.68.220 (West 1992).

85. *See* ARIZ. REV. STAT. ANN. § 13-4202(c) (1989) (notice shall be published once a year for five years); ARK. CODE ANN. § 16-90-308(d) (Michie 1987) (notice shall be published once a year for four years); ILL. ANN. STAT. ch. 725, para. 145/5 (Smith-Hurd 1992) (board shall notify all known victims and publish a notice once a year for five years); LA. REV. STAT. ANN. § 46:1834 (West 1982) (notice shall be published once every six months for two years); MASS. ANN. LAWS ch. 258A, § 8 (Law. Co-op. 1992) (notice shall be published once every six months for three years); MINN. STAT. ANN. § 611A.68(3) (West Supp. 1994) (all attempts will be made to notify known victims and a notice shall be published); MISS. CODE ANN. § 99-38-7(2) (Supp. 1993) (notice shall be published once every four months for one year); N.Y. EXEC. LAW § 632-a(5)(b) (McKinney Supp. 1994) (notice shall be published once every six months for three years); OR. REV. STAT. § 147.275(4) (Supp. 1992) (notice shall be published once a year for five years); R.I. GEN. LAWS § 12-25.1-8 (Supp. 1993) (notice shall be published once every six months for three years); S.D. CODIFIED LAWS ANN. § 23A-28A-4 (1988) (notice shall be published once a year for five years); UTAH CODE ANN. § 78-11-12.5(7) (1992) (notice shall be published once every six months for six years from the date the money is received); WIS. STAT. ANN. § 949.01(3) (West Supp. 1992) (notice shall be published once every six months for three years).

that the crime victims be notified directly by the respective state agencies.<sup>87</sup>

The statute of limitations for bringing a cause of action against a criminal defendant also varies from state to state. A number of states require that a cause of action for a money judgment be brought within five years of the establishment of the escrow account,<sup>88</sup> within five years from the date that the crime was commit-

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86. See ALASKA STAT. § 12.61.020 (1990); CAL. CIV. CODE § 2225 (West Supp. 1994); COLO. REV. STAT. §§ 24-4.1-201 to -202 (1988); CONN. GEN. STAT. ANN. § 54-218 (West 1985); FLA. STAT. ANN. § 944.512 (West Supp. 1993); HAW. REV. STAT. §§ 351-81 to -88 (Supp. 1992); KY. REV. STAT. ANN. § 346.165 (Michie/Bobbs-Merrill 1993); MICH. COMP. LAWS ANN. § 780.768 (West Supp. 1993); MISS. CODE ANN. §§ 99-38-1 to -11 (Supp. 1993); NEB. REV. STAT. §§ 81-1836 to -1841 (1987 & Supp. 1992); N.M. STAT. ANN. § 31-22-22 (Michie 1990); OHIO REV. CODE ANN. §§ 2969.01-.06 (Anderson 1993); TENN. CODE AN. §§ 29-13-201 to -208 (1980); VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993).

87. See ALA. CODE § 41-9-81 (1991) (board of adjustment shall notify all crime victims); ILL. ANN. STAT. ch. 725, para. 145/5 (Smith-Hurd 1992) (Treasurer shall notify all known victims and publish a notice once a year for five years); IOWA CODE ANN. § 910.15(3) (West 1994) (all reasonable efforts shall be made to notify crime victims); KAN. STAT. ANN. § 74-7320 (1992) (crime victims compensation board shall notify crime victims); MD. ANN. CODE art. 27, §§ 764(a)-(c) (Supp. 1993) (notice shall be mailed to all known victims and a notice shall be published once every six months for five years); MINN. STAT. ANN. § 611A.68(3) (West Supp. 1994) (all attempts will be made to notify known victims and a notice shall be published); MONT. CODE ANN. § 53-9-104(2)(e) (1993) (law enforcement agencies and officials shall take reasonable care to inform victims); NEV. REV. STAT. ANN. § 217.005 (Michie 1986) (state may prepare and disseminate information regarding the benefits available to crime victims); N.J. STAT. ANN. § 52:4B-28 (West 1986) (identify all known and publish a notice once every six months for five years); TEX. REV. CIV. STAT. ANN. art. 8309, § 10(f) (West Supp. 1993) (local law enforcement agency shall inform crime victims); WYO. STAT. § 1-40-115 (1988) (law enforcement agency shall exercise reasonable care to notify crime victims).

88. See ARIZ. REV. STAT. ANN. § 13-4202(E) (1989); COLO. REV. STAT. § 24-4.1-201(1) (1988); DEL. CODE ANN. tit. 11, § 9103(c) (Supp. 1992); GA. CODE ANN. § 17-14-31(a)(3) (Michie 1990); IDAHO CODE § 19-5301(1) (1987); ILL. ANN. STAT. ch. 725, para. 145/3 (Smith-Hurd 1992); IOWA CODE ANN. § 910.15(8) (West 1994); KY. REV. STAT. ANN. § 346.165(2) (Michie/Bobbs-Merrill 1993); MD. ANN. CODE art. 27, § 764(a) (Supp. 1993); MICH. COMP. LAWS ANN. § 780.768 (18)(2) (West Supp. 1993); MINN. STAT. ANN. § 611A.68(4)(b)(3) (West Supp. 1994); MO. ANN. STAT. § 595.045(14) (Vernon Supp. 1993); NEB. REV. STAT. § 81-1838 (1987); N.J. STAT. ANN. § 52:4B-28 (West 1986); N.M. STAT. ANN. § 31-22-22(F) (Michie 1990); OKLA. STAT. ANN. tit. 22, § 17(c) (West 1992); OR. REV. STAT. § 147.275(3)(b) (Supp. 1992); PA. STAT. ANN. tit. 71, § 180-7.18(a) (1990); S.D. CODIFIED LAWS ANN. § 23A-28A-3 (1988); TEX. REV. CIV. STAT. ANN. art. 8309, § 18 (West Supp. 1993); VA. CODE ANN. § 19.2-368.21 (Michie

ted;<sup>89</sup> or within five years from the date that charges were filed against the criminal defendant.<sup>90</sup> The remainder of the crime victimization statutes have varying statutory periods for bringing a claim against a criminal defendant.<sup>91</sup> Some states also prioritize the distribution of the proceeds earned by a convicted individual.<sup>92</sup>

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Supp. 1993); WASH. REV. CODE ANN. § 7.68.220 (West 1992).

89. See ALA. CODE § 41-9-80 (1991); CONN. GEN. STAT. ANN. § 54-218(a) (West 1985); S.C. CODE ANN. § 15-59-40 (Law. Co-op. Supp. 1992); TENN. CODE ANN. § 29-13-202(b) (1980);

90. See ARK. CODE ANN. § 16-90-308(c)(2) (Michie 1987).

91. See ALASKA STAT. § 12.61.020(c) (1990) (ten years from the date the crime was committed or the identity of the perpetrator is discovered); CAL. CIV. CODE § 2225(a)(9)(b) (West Supp. 1994) (five years from the establishment of the account or date of conviction whichever is later); HAW. REV. STAT. § 351-88(2) (ten years from the date of the last judgment obtained by a victim or a victim's representative) (Supp. 1992); KAN. STAT. ANN. § 74-7319(b) (1992) (a claim must be filed within six months of notification and further evidence must be provided within two years); LA. REV. STAT. ANN. § 46:1833 (West 1982) (notice of intent to file a claim must be made within one year); MASS. ANN. LAWS ch. 258A, § 8 (Law. Co-op. 1992) (three years from the establishment of the account); MISS. CODE ANN. § 99-38-7 (Supp. 1993) (one year from the establishment of the account); MONT. CODE ANN. § 53-9-104(d) (1993) (the statutory period is left up to the discretion of the Division of Crime Control of the Department of Justice); NEV. REV. STAT. ANN. § 217.007(1) (Michie Supp. 1993) (five years after the crime victim is legally entitled to receive money); N.Y. EXEC. LAW § 632-a(3) (McKinney Supp. 1994) (three years from the discovery of the profits); OHIO REV. CODE ANN. § 2969.04(B) (Anderson 1993) (three years from the establishment of the account); R.I. GEN. LAWS § 12-25.1-7 (Supp. 1993) (three years after the establishment of the account or after other compensation is made to the criminal defendant, whichever is later); UTAH CODE ANN. § 78-11-12.5(1)(b) (1992) (six years from the establishment of the account); WIS. STAT. ANN. § 949.165(8) (West Supp. 1992) (three years from the establishment of the account); WYO. STAT. § 1-40-112(f) (1988) (five years from the date of an order for the purpose of satisfying a civil judgment).

92. DEL. CODE ANN. tit. 11, § 9103(f) (Supp. 1992) (distribution of the payments are prioritized: (1) payment ordered by the Violent Crimes Compensation Board; (2) judgment against the person; (3) subrogation claims; (4) civil judgment of victims; (5) other judgment creditors; and (6) the convicted individual); FLA. STAT. ANN. §§ 944.512(2)(a)-(d) (West Supp. 1993) (statute apportions the proceeds as follows: (a) 25 percent to the dependents of a convicted felon; (b) 25 percent to the victim(s); (c) coverage of court costs; (d) balance to the Crimes Compensation Trust Fund); KAN. STAT. ANN. §§ 74-7320(b)(1)-(5) (1992) (if the individual is convicted, the money is used first to satisfy claims by the victims; second, to pay any restitution ordered by the court; third, to pay the defendant's state legal fees; fourth, any court costs are paid; fifth, to pay any additional compensation; and sixth, any money remaining will be deposited in the state treasury); MICH. COMP. LAWS ANN. §§ 780.768(3)(a)-(c) (West Supp. 1993) (the state apportions the proceeds first for orders of restitution, second for civil judgments in favor of the

Certain provisions found in various crime victimization statutes would be found unconstitutional pursuant to the holding of *Simon & Schuster*.<sup>93</sup> These provisions will be discussed in the following sections.

### III. THE UNCONSTITUTIONALLY OVERBROAD DEFINITION OF A CRIMINAL DEFENDANT

In *Simon & Schuster*, the Supreme Court held that the definition of a "person convicted of a crime" in New York's original statute was unconstitutionally overbroad because it had required the forfeiture of proceeds of anyone who was accused of a crime or anyone who voluntarily admitted to the commission of the crime, regardless of whether that person was eventually convicted.<sup>94</sup> In rendering its decision, the Court noted that, under the original statute, a prominent figure who includes in his autobiography a recollection of having stolen a worthless item as a youth would be subject to forfeiture of the proceeds.<sup>95</sup> This indicated to the Court that the statute was unconstitutional because it was not narrowly tai-

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victim and third to reimburse the state for incarcerating the individual); N.J. STAT. ANN. § 52:4B-30 (West 1986) (if the individual is convicted, the money is distributed as follows: (1) civil judgments of victims; (2) restitution orders; (3) judgment creditors; (4) costs incurred by Violent Crimes Compensation Board; and (5) if after five years there is any money remaining, it is deposited in escrow for use in satisfying claims filed pursuant to the "Criminal Injuries Compensation Act of 1971"); R.I. GEN. LAWS §§ 12-25.1-3(C)(1)-(8) (Supp. 1993) (claims against the fund shall be paid as follows: first, claims by the state for representation of a defendant by a public defender or court appointed attorney; second, costs incurred for investigation and prosecution of the crime; third, claims by victims; fourth, claims by the state for recovery by an offender; fifth, civil judgments in favor of a victim of a criminally responsible person; sixth, after the lapse of the statutory period and satisfaction of subparagraphs one through five, one-half of the money shall go to the violent crimes indemnity fund; seventh, claims by other creditors; and eighth, claims by the criminally responsible person or a representative thereof); WIS. STAT. ANN. §§ 949.165(5)-(7) (West Supp. 1993) (the statute apportions the money first paying for the legal representation of the individual; second, for satisfying the money judgments of the victims; and third, for paying all legal fees and making restitution).

93. See discussion *supra* part I.B.2.

94. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S. Ct. 501 (1991); see *supra* notes 60-63 and accompanying text.

95. 112 S. Ct. at 512.

lored to achieving the objective of compensating crime victims.<sup>96</sup>

Unlike New York,<sup>97</sup> three states that need to amend their statutes to comply with the Supreme Court decision in *Simon & Schuster* have not done so. Alaska, Rhode Island, and Utah have failed to amend their statutes to comply with the *Simon & Schuster* decision on this point.<sup>98</sup> Although Alaska's current crime victimization statute does not use the identical definition that the Supreme Court declared unconstitutional in *Simon & Schuster*,<sup>99</sup> its definition of "offender" is still significantly overbroad because it is defined as a person who has committed a crime whether or not he or she has been convicted.<sup>100</sup> Rhode Island's present statute overbroadly defines a "criminally responsible person" as a convicted individual, an individual who is found not guilty by reason of insanity,<sup>101</sup> or an individual who has "voluntarily admitted the commission of such offense."<sup>102</sup> Furthermore, the statute also sets forth an unconstitutional provision for an "alleged criminally responsible person" as one who has been indicted or against whom information has been obtained but who has not yet been convicted or acquitted.<sup>103</sup> Utah's definition of "person convicted of a crime" is identical to the definition in New York's original statute and is therefore unconstitutional.<sup>104</sup>

However, the majority of states satisfy the requirements set forth by the Court in *Simon & Schuster* either (1) because they have amended their statutes to delete any unconstitutionally broad

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96. See *supra* notes 60-63 and accompanying text.

97. The New York legislature, in amending the original statute, deleted the definition of a "person convicted of a crime." See *supra* notes 74-76 and accompanying text.

98. ALASKA STAT. § 12.61.020(d) (1990); R.I. GEN. LAWS §§ 12-25.1-2(d), (f) (Supp. 1993); UTAH CODE ANN. § 78-11-12.5(5)(b) (1992).

99. Compare N.Y. EXEC. LAW § 632-a(10) (McKinney 1982) with ALASKA STAT. § 12.61.020(d) (1990).

100. ALASKA STAT. § 12.61.020(e)(1) (1990).

101. Notably, the Supreme Court in *Simon & Schuster* did not object to a provision deeming a person guilty by reason of insanity as a convicted person. See *supra* note 64.

102. R.I. GEN. LAWS § 12-25.1-2(d) (Supp. 1993).

103. R.I. GEN. LAWS § 12-25.1-2(f) (Supp. 1993).

104. Compare UTAH CODE ANN. § 78-11-12.5(5)(b) (1992) with N.Y. EXEC. LAW § 632-a(10) (McKinney 1982).

definition of a criminal defendant,<sup>105</sup> (2) because their current statutes' definitions withstand strict scrutiny and thus require no modification,<sup>106</sup> or (3) because their current statutes contain no specific definition of a criminal defendant.<sup>107</sup>

Only two states besides New York have adequately amended their statutes in compliance with the *Simon & Schuster* decision. Delaware amended its crime victimization statute, altering the definition of "person convicted of a crime" to omit the language defining a person as convicted if he or she "voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted."<sup>108</sup> This original language was identical to that which the Supreme Court determined was overbroad in *Simon & Schuster*.<sup>109</sup> Maryland also amended its statute to delete its over-inclusive definition of a defendant as an individual who voluntarily

105. See DEL. CODE ANN. tit. 11, § 9102(3) (Supp. 1992); MD. ANN. CODE art. 27, § 764(a)(2) (Supp. 1993); N.Y. EXEC. LAW. § 632-a (McKinney Supp. 1994).

106. See ARIZ. REV. STAT. ANN. § 13-4201 (1989); ARK. CODE ANN. § 16-90-308 (Michie 1987); CAL. CIV. CODE § 2225(a)(1) (West Supp. 1994); FLA. STAT. ANN. § 944.512(1) (West Supp. 1993); GA. CODE ANN. § 17-14-30 (Michie 1990); IOWA CODE ANN. § 910.15(1)(a) (West 1994); LA. REV. STAT. ANN. § 46:1831(2)(B) (West 1982); MASS. ANN. LAWS ch. 258A, § 1 (Law. Co-op. 1992); MINN. STAT. ANN. § 611A.68(1c) (West Supp. 1994); MO. ANN. STAT. § 595.045(14) (Vernon Supp. 1993); N.J. STAT. ANN. § 52:4B-26 (West 1986); OHIO REV. CODE ANN. § 2969.01 (Anderson 1993); OKLA. STAT. ANN. tit. 22, § 17(A) (West 1992); PA. STAT. ANN. tit. 71, § 180-7.18(2) (1990); TEX. REV. CIV. STAT. ANN. art. 8309, § 14 (West Supp. 1993); VA. CODE ANN. § 19.2-368.19 (Michie Supp. 1993).

107. The following statutes require only that the individual be convicted, but do not provide any specific definition: See ALA. CODE § 41-9-80 (1991); COLO. REV. STAT. § 24-4.1-201(1) (1988); CONN. GEN. STAT. ANN. § 54-218(a) (West 1985); HAW. REV. STAT. § 351-82 (Supp. 1992); IDAHO CODE § 19-5301(1) (1987); ILL. ANN. STAT. ch. 725, para. 145/3 (Smith-Hurd 1992); KAN. STAT. ANN. § 74-7319(a) (1992); KY. REV. STAT. ANN. § 346.165(2) (Michie/Bobbs-Merrill 1993); MICH. COMP. LAWS ANN. § 780.768(2) (West Supp. 1993); MISS. CODE ANN. § 99-38-9 (Supp. 1993); MONT. CODE ANN. § 53-9-104(d) (1993); NEB. REV. STAT. § 81-1836 (1987); N.M. STAT. ANN. § 31-22-22(B) (Michie 1990); OR. REV. STAT. § 147.275(2) (Supp. 1992); S.C. CODE ANN. § 15-59-40 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 23A-28A-3 (1988); TENN. CODE ANN. § 29-13-202(a) (1980); WASH. REV. CODE ANN. § 7.68.200 (West 1992); WIS. STAT. ANN. § 949.165(2) (West Supp. 1992); WYO. STAT. § 1-40-112(d) (1988).

108. Compare DEL. CODE ANN. tit. 11, § 9102(3) (Supp. 1992) with DEL. CODE ANN. tit. 11, § 9102(3) (1987); see generally Zavack, *supra* note 15, at 724.

109. See *supra* notes 60-63 and accompanying text.



admitted the commission of a crime without having been convicted of that crime.<sup>110</sup> In Maryland, "defendant" is now defined as an individual charged with or convicted of a crime.<sup>111</sup> Both of these amended statutes have definitions of a criminal defendant that are narrowly tailored to the states' objective of compensating crime victims and are therefore constitutional.

On the other hand, sixteen current statutes contain narrow definitions of a criminal defendant which comply with the *Simon & Schuster* decision and, therefore, need not be amended.<sup>112</sup> For example, under Minnesota law, "offender" is described as a "person convicted of a crime or found not guilty of a crime by reason of insanity."<sup>113</sup> Iowa's crime victimization statute also contains a definition consistent with the Supreme Court's decision.<sup>114</sup> Under Iowa law, "convicted felon" is defined as "a person initially convicted, or found not guilty by reason of insanity, . . . either by a court or jury trial or by entry of a guilty plea in court."<sup>115</sup> Finally, twenty states define criminal defendant merely as a person convicted of a crime and thereby do not offend the *Simon & Schuster* decision.<sup>116</sup> Thus, crime victimization statutes that do not reach those individuals who are never convicted of a crime, as defined by the specific statutes, are constitutional under *Simon & Schuster*.

#### IV. CONTENT-BASED RESTRICTION

In *Simon & Schuster*, the Supreme Court held that states cannot place a "financial disincentive only on speech of a particular con-

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110. Compare MD. ANN. CODE art. 27, § 764(a)(2) (Supp. 1993) with MD. ANN. CODE art. 27, § 764(a)(2) (1992).

111. MD. ANN. CODE art. 27, § 764(a)(2) (Supp. 1993). Notably, section 764(d)(3) requires that the money be returned to the criminal defendant upon acquittal. MD. ANN. CODE art. 27, § 764(d)(3) (Supp. 1993). Therefore, it can be inferred that the individual must ultimately be convicted to trigger the crime victimization statute.

112. See *supra* note 107.

113. MINN. STAT. ANN. § 611A.68(c) (West Supp. 1994). See *supra* note 102.

114. See IOWA CODE ANN. § 910.15(1)(a) (West 1994). Iowa amended its statute on other grounds. See *infra* notes 143-145 and accompanying text.

115. IOWA CODE ANN. § 910.15(1)(a) (West 1994).

116. See *supra* note 108.

tent.”<sup>117</sup> The Supreme Court’s decision, however, did not specifically address whether those statutes which make no reference to the proceeds generated by First Amendment activities would be considered constitutional. It did imply, however, that a statute which did not specifically single out the speech of a criminal defendant and place a financial burden on it would be constitutional.<sup>118</sup> The Supreme Court found that New York had “a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer’s speech about the crime.”<sup>119</sup>

A crime victimization statute which seizes the proceeds derived from any and all sources would appear to be narrowly tailored to achieving the state’s objective of compensating crime victims. Thus, it can be concluded that statutes that seize all proceeds received from whatever source are constitutional. However, any statute that singles out the speech of criminal authors solely because of its content and places a financial burden on it would be declared unconstitutional. A majority of crime victimization statutes single out the speech of criminal authors and place a financial burden on it.<sup>120</sup> Some statutes, however, have been amended to meet the “narrowly tailored” requirement set forth in *Simon & Schuster*.<sup>121</sup>

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117. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991).

118. *See id.* at 510; *see also supra* notes 52-66 and accompanying text.

119. *Id.* at 511; *see also* Conrad, *supra* note 15, at 52 (states can solve the “narrowly tailored” problem by reaching all of a criminal’s assets regardless of the source); Soderberg, *supra* note 15, at 662 (if the legislature had really been concerned about compensating victims, they would seize all criminal profits rather than suppress speech); Zavack, *supra* note 15, at 719 (proceeds should be seized from whatever source); Reed, *supra* note 15, at 1068 (if we really want to punish someone who has been enriched as a result of criminal activity, then extend the statute to all illegal profits however obtained).

120. *See* statutes cited *infra* notes 123 and 134.

121. *See infra* note 142.

A. *Unamended, and Therefore Unconstitutional, Crime Victimization Statutes*

Similar to New York's original statute, the unamended statutes of twenty-five states unconstitutionally single out the speech of a criminal defendant and place a financial burden on it.<sup>122</sup> All of these statutes require the forfeiture of proceeds which are earned by a criminal defendant by way of movie, book, article, radio or television program, live entertainment of any kind, or from the expression of such person's thoughts, feelings, opinions or emotions regarding such crime.<sup>123</sup> Furthermore, some statutes require the forfeiture of proceeds that are earned also by way of tape recording or phonograph record.<sup>124</sup>

For example, California singles out the speech of convicted individuals in its definition of "materials."<sup>125</sup> Like many "Son of Sam" laws, Minnesota's statute specifically refers to First Amendment activities in its definition of a contract entered into with a

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122. CAL. CIV. CODE § 2225(a)(9) (West Supp. 1994); COLO. REV. STAT. § 24-4.1-201(1) (1988); GA. CODE ANN. § 17-14-31(a)(1) (Michie 1990); HAW. REV. STAT. § 351-81 (Supp. 1992); IDAHO CODE § 19-5301(1) (1987); KAN. STAT. ANN. § 74-7319(a) (1992); KY. REV. STAT. ANN. § 346.165(1) (Michie/Bobbs-Merrill 1993); MASS. ANN. LAWS ch. 258A, § 8 (Law. Co-op. 1992); MINN. STAT. ANN. § 611A.68(a) (West Supp. 1994); MISS. CODE ANN. § 99-38-5 (Supp. 1993); NEB. REV. STAT. § 81-1836 (1987); N.J. STAT. ANN. § 52:4B-26 (West 1986); N.M. STAT. ANN. § 31-22-22(A) (Michie 1990); OHIO REV. CODE ANN. § 2969.02(A) (Anderson 1993); OKLA. STAT. ANN. tit. 22, § 17(A) (West 1992); OR. REV. STAT. § 147.275(1) (Supp. 1992); PA. STAT. ANN. tit. 71, § 180-7.18(a) (1990); S.C. CODE ANN. § 15-59-40 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 23A-28A-1 (1988); TENN. CODE ANN. § 29-13-202(a) (1980); TEX. REV. CIV. STAT. ANN. art. 8309, § 16 (West Supp. 1993); WASH. REV. CODE ANN. § 7.68.200 (West 1992); WIS. STAT. ANN. § 949.165(2) (West Supp. 1992); WYO. STAT. § 1-40-112 (1988).

123. See statutes cited *supra* note 123.

124. See GA. CODE ANN. § 17-14-31(a)(1) (Michie 1990); MISS. CODE ANN. § 99-38-5 (Supp. 1993) (also includes photographs); OR. REV. STAT. § 147.275(1) (Supp. 1992); PA. STAT. ANN. tit. 71, § 180-7.18(a) (1990); S.D. CODIFIED LAWS ANN. § 23A-28A-1 (1988); TEX. REV. CIV. STAT. ANN. art. 8309, § 16 (West Supp. 1993); WASH. REV. CODE ANN. § 7.68.200 (West 1992); WIS. STAT. ANN. § 949.165(2) (West Supp. 1992).

125. CAL. CIV. CODE § 2225(a)(6) (West Supp. 1994). "All proceeds from . . . the sale of materials that include or are based on the story of a felony for which such convicted felon was convicted, shall be subject to [forfeiture]." CAL. CIV. CODE § 2225(a)(9)(b) (West Supp. 1994). For further discussion, see Zavack, *supra* note 15.

criminal defendant.<sup>126</sup> Its criteria for determining whether proceeds earned under contract should be forfeited, however, are different from those of most states. Most states simply require that all of the proceeds be turned over to the appropriate state agency.<sup>127</sup> Minnesota is unusual because its statute provides that if a criminal defendant enters into a contract within ten years after conviction, the crime victims reparations board must be notified and the money must be paid over to the board according to the following terms:

(a) if the crime occurred in this state, the person shall pay to the board 100 percent of the money owed under the contract; (b) if the crime occurred in another jurisdiction having a law applicable to the contract which is substantially similar to this section, this section does not apply, and the person must not pay to the board any of the money owed under the contract; and (c) in all other cases, the person shall pay to the board that percentage of money owed under the contract which can fairly be attributed to commerce in this state with respect to the subject matter of the contract.<sup>128</sup>

Pennsylvania's crime victimization statute not only places a financial burden on criminal authors because of the content of their speech, but also has an unusual provision permitting the accused to make a voluntary request to the state's crime victims compensation board that the crime victim be compensated.<sup>129</sup> However, the law requires that the accused be criminally convicted before such compensation is awarded.<sup>130</sup>

Rhode Island singles out the speech of criminal authors by requiring that any proceeds derived from the commercial exploitation of the activities of a criminally responsible person or an alleged criminally responsible person be turned over to the general

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126. MINN. STAT. ANN. § 611A.68(a) (West Supp. 1994).

127. *See, e.g.*, ALA. CODE § 41-9-80 (1991); S.C. CODE ANN. § 15-59-40 (Law Co-op. Supp. 1992).

128. MINN. STAT. ANN. § 611A.68(2a) (West Supp. 1994).

129. PA. STAT. ANN. tit. 71, § 180-7.18(a) (1990).

130. PA. STAT. ANN. tit. 71, § 180-7.18(a) (1990).

treasurer to be placed in the criminal royalties fund.<sup>131</sup> "Commercial exploitation" is defined as "any publication, reenactment, dramatization, interview, depiction, explanation or expression through any medium of communication which is undertaken for financial consideration."<sup>132</sup>

*B. Amended Statutes That Do Not Comply With the Simon & Schuster Decision*

Two states unsuccessfully amended their crime victimization statutes in an attempt to comply with the *Simon & Schuster* decision.<sup>133</sup> Louisiana also attempted to revise its crime victimization statute to comply with the *Simon & Schuster* decision, but the legislative session ended before an agreement could be reached as to the wording of the amendment which, inter alia, removed all references to First Amendment activities.<sup>134</sup> Currently, Louisiana requires that the proceeds received from the First Amendment activities of a convicted individual be forfeited.<sup>135</sup> Therefore, Louisiana's current statute is unconstitutional under *Simon & Schuster*.

Although, the Delaware legislature amended its statute,<sup>136</sup> it did not revise the section relating to those First Amendment activities which require forfeiture.<sup>137</sup> Therefore, Delaware's amended statute still unconstitutionally singles out the speech of criminal authors and places a financial burden on it.<sup>138</sup>

Finally, despite the *Simon & Schuster* decision, the Nevada legislature amended its statute and *added* specific references to

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131. R.I. GEN. LAWS §§ 12-25.1-3(a)-(b) (Supp. 1993).

132. R.I. GEN. LAWS § 12-25.1-2(b) (Supp. 1993).

133. DEL. CODE ANN. tit. 11, § 9103(a) (Supp. 1992; 1993 LA. SESS. LAW SERV. 157 (West); NEV. REV. STAT. ANN. § 217.007(3)(a) (Michie Supp. 1993).

134. 1993 LA. SESS. LAW SERV. 157 (West).

135. LA. REV. STAT. ANN. § 46:1832(A) (West 1982).

136. See *supra* note 108.

137. The only change the legislature made in section 9103(a) was to require that the individual be convicted, rather than that he or she be merely "accused or convicted." Compare DEL. CODE ANN. tit. 11, § 9103(a) (Supp. 1992) with DEL. CODE ANN. tit. 11, § 9103(a) (1987).

138. DEL. CODE ANN. tit. 11, § 9103(a) (Supp. 1992).

First Amendment activities.<sup>139</sup> "Material" is now defined as "a book, magazine or newspaper article, movie, film, videotape, sound recording, interview or appearance on a television or radio station and live presentations of any kind."<sup>140</sup>

*C. Amended Crime Victimization Statutes That Comply With the Simon & Schuster Decision*

Three states besides New York appear to have successfully amended their crime victimization statutes to comply with the holding in *Simon & Schuster*.<sup>141</sup> Iowa's amended statute does not specifically single out the speech of criminal authors.<sup>142</sup> Instead, it defines "proceeds" in a much broader sense as the fruits of the crime received from whatever source.<sup>143</sup> "Fruits of the crime" is defined as any profit which, were it not for the crime, would not have been received without the commission of the crime.<sup>144</sup> Iowa's statute as currently written would survive a constitutional challenge because it does not single out the speech of convicted individuals and place a financial burden thereon. Therefore, the statute is narrowly tailored to the state's objective of compensating crime victims and preventing criminals from profiting from their crimes.

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139. Compare NEV. REV. STAT. ANN. § 217.007(3)(a) (Michie Supp. 1993) with NEV. REV. STAT. ANN. § 217.265 (Michie 1986).

140. NEV. REV. STAT. ANN. § 217.007(3)(a) (Michie Supp. 1993). The statute provides that a crime victim is entitled to commence an action against a person convicted of a felony who has received proceeds "for any contribution to any material that is based upon or substantially related to the felony which was perpetrated against the victim." NEV. REV. STAT. ANN. § 217.007(1) (Michie Supp. 1993).

141. IOWA CODE ANN. § 910.15 (West 1994); MD. ANN. CODE art. 27, § 764 (Supp. 1993); VA. CODE ANN. § 19.2-368 (Michie Supp. 1993).

142. IOWA CODE ANN. § 910.15 (West 1994). For further analysis of Iowa's law, see Zavack, *supra* note 15, at 726.

143. IOWA CODE ANN. § 910.15(1)(e) (West 1994).

144. IOWA CODE ANN. § 910.15(1)(d) (West 1994). Furthermore, "convicted felon" is defined as a person initially convicted, or found not guilty by reason of insanity, of a felony by a court or jury or by entry of a guilty plea. IOWA CODE ANN. § 910.15(1)(a) (West 1994). "Representative of a convicted felon" is defined as "any person or entity receiving proceeds by designation of that convicted felon, or on behalf of that convicted felon, or in the stead of that convicted felon, whether by the felon's designation or by operation of law." IOWA CODE ANN. § 910.15(1)(f) (West 1994).

Prior to 1992, Maryland's statute limited the activities that trigger forfeiture to First Amendment activities.<sup>145</sup> Currently, the statute attacks any profits directly or indirectly received from the crime, including, but not limited to, First Amendment activities under its definition of "notoriety of crimes contract."<sup>146</sup> This definition includes a contract made with a defendant with respect to: (1) First Amendment activities such as a book, movie or television program; (2) an expression of defendant's thoughts regarding a crime involving or causing injury, death or property loss as a direct result of the crime; or (3) proceeds or profits that directly or indirectly result from the crime, sentence, or the notoriety thereof.<sup>147</sup> Despite specific references to First Amendment activities, since the Maryland statute is not limited to those activities, the courts should find it is constitutional under *Simon & Schuster*.

Virginia's amended statute does not place a financial burden on convicted individuals because of the content of their speech.<sup>148</sup> Rather, the statute requires that the proceeds or profits of a crime from any source received as a direct or indirect result be forfeited after a hearing.<sup>149</sup> Because the Virginia statute forfeits the proceeds received from whatever source and does not specifically single out the speech of criminal authors, it is consistent with the *Simon & Schuster* decision.

### CONCLUSION

From a moral standpoint, the reasoning behind the original New York statute is sound. Convicted felons should not be able to prof-

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145. MD. ANN. CODE art. 27, § 764(b) (1992).

146. MD. ANN. CODE art. 27, § 764(a)(5) (Supp. 1993). The defendant shall have the opportunity to rebut the presumption that the contract is a notoriety of crimes contract and the attorney general shall render his or her decision no later than 180 days after receiving the contract. MD. ANN. CODE art. 27, §§ 764(c)(2), (3) (Supp. 1993).

147. MD. ANN. CODE art. 27, § 764(a)(5) (Supp. 1993).

148. VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993).

149. VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993). Should the profits come from a depiction of the individual's crime, the statute requires that an integral part of the work be a depiction of the crime or discussion of the defendant's thoughts or emotions in order to be subject to forfeiture. VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993).

it from their crimes until their victims are duly compensated. By permitting them to depict stories based on their crimes and in turn receive compensation, society is, in effect, condoning the crimes they have committed. From a legal perspective, however, the decision of the Supreme Court in *Simon & Schuster* is valid. New York's original statute was not narrowly tailored to achieve the dual objectives of compensating crime victims and preventing criminals from profiting from their crimes. It went beyond what was necessary to protect victims of crimes. It needlessly singled out First Amendment speech and overbroadly implicated those merely accused of crimes.

Crime victimization statutes are a valuable part of our criminal justice system. Even under the *Simon & Schuster* decision, these statutes can be tailored so as to not violate the First Amendment. Therefore, the crime victimization statutes of various states should be amended so that they no longer single out the speech of criminal defendants and place a financial burden on it. Further, three states need to redefine or omit their definitions of a criminal defendant. The statutes should seize any and all proceeds or property earned by convicted individuals as a result of their crimes for the specific purposes of compensating crime victims and preventing criminal defendants from profiting from their crimes. In such instances, both the crime victims' compensation and the protections afforded by the First Amendment are preserved.

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